

**Testimony of  
Commissioner Linda Breathitt  
Federal Energy Regulatory Commission  
before the  
Subcommittee on Energy and Air Quality  
Committee on Energy and Commerce  
United States House of Representatives**

**June 27, 2001**

Mr. Chairman and Members of the Subcommittee:

I am pleased to have the opportunity to submit my testimony on the role of hydroelectric power in helping to meet our Nation's energy demands, the role of federal government in licensing the operation of hydroelectric dams, and barriers to efficient operation and licensing of hydroelectric dams. The Commission regulates hydroelectric facilities that produce over five percent of all electric power generated in the United States. The Commission's Office of Energy Projects administers programs for (1) the licensing and relicensing of jurisdictional projects; (2) the continued regulatory oversight of licensed projects during their license term; and (3) the oversight of the safety of licensed hydropower dams.

Most recently, the Commission's focus in the hydroelectric arena has been to seek ways, within our jurisdiction, to minimize the severity of the power crisis faced by citizens in the Western states. Hydropower comprises approximately 40 percent of the total Western Systems Coordinating Council (WSCC) generation capacity. In the testimony I submitted for the March 20, 2001 hearing before this Subcommittee, I noted

that the Commission has launched an initiative to explore the feasibility of increasing energy production, peaking capacity, and other power benefits of hydropower projects by easing certain operating constraints. I also anticipated the tensions that would likely occur, upon review of licensees' applications responding to our initiative, in finding a balance between greater operational flexibility and the protection of environmental resources.

The Commission has so far responded to three requests by licensees in the West to waive certain license conditions pertaining to minimum flow and reservoir level requirements in order to increase generation. Indeed, the major issues in those cases have involved competing power and non-power interests. To grant even a temporary waiver of license conditions entails careful consideration since such operating constraints serve to protect many resources, such as resident and anadromous fish, water quality, recreation, municipal and industrial water supplies, and agricultural resources. In each case, my support for waiver of the license conditions at issue was tempered with a concern that any action taken should not negatively affect the long-term health of the environment. I believe that it is important not to create additional problems through lack of measured consideration and foresight. Rehearing is pending on two of the approved waivers, and the Commission is reviewing comments in the third proceeding. The Commission also has pending before it six additional applications for relief from license conditions to

increase generation in the WSCC region. I intend to give these pending matters my full attention.

The Subcommittee asks the Commissioners to comment on procedures for licensing projects that are within the Commission's jurisdiction. In this regard, I refer the Members of the Subcommittee to the Report on Hydroelectric Licensing Policies, Procedures, and Regulations: Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000 (Staff Report), a document prepared by the Commission's staff and submitted to the United States Congress in May 2001. The Staff Report provides a thorough review of our hydroelectric licensing program and presents staff's conclusions and recommendations for legislative, procedural, and policy changes to reduce the costs and time involved in the licensing process. As the report points out, the median time from the filing of a license application to its conclusion for recent applications is 43 months, and many proceedings take substantially longer. Clearly there remain impediments to the efficient administration of the Commission's licensing authority; and to the extent I can add my perspective on staff's recommended measures, I will do so below.

More so than in any other program area administered by the Commission, the hydroelectric licensing process entails statutory requirements that give other agencies a significant and powerful role in the licensing process. The Commission has continuously

endeavored to work with these other agencies to seek faster resolution to licensing proceedings; however, I agree with staff's conclusions that additional legislation would assist in this regard. Staff's primary recommendation is that Congress restore the Commission's position as the sole federal decisional authority for licensing conditions and processes. Under this approach, those Federal agencies with the authority to impose mandatory license conditions would retain that authority, subject to a statutory reservation of Commission authority to reject or modify the conditions based on inconsistency with the Commission's overall public interest determination. This approach could be described as "one-stop shopping" at the Commission for all federal authorizations.

While I share staff's views that there remain impediments to efficient hydrolicensing that legislation could alleviate, I do not join in the recommendation for a "one-stop shopping" approach. As detailed in the Staff Report, various agencies -- the Departments of Agriculture, Interior and Commerce, among other federal and state entities -- are called upon during the licensing process to evaluate many competing aspects of license applications, and I believe it is appropriate for licenses to reflect the specialized expertise of these other agencies. Each brings to the table important responsibilities in mitigating the environmental effects of hydropower generation. While I firmly believe that the cost and delay of licensing should be minimized where possible, this should not come at the expense of legitimate environmental mitigation.

I do, however, agree with some of the alternative legislative recommendations presented in the Staff Report. I would support legislation that would target legislative solutions to the specific impediments the Commission faces in exercising our existing statutory authority. First, I would advocate requiring agencies with mandatory conditioning authority to better support their conditions with a full range of public interest values and to provide a clear administrative appeals process. I believe that this could result in licenses that reflect a better balance of developmental and environmental values, as well as less costly mandatory conditions.

Second, I believe it would be very helpful if Congress clarified the statutory definition of "fishways", which Section 18 of the Federal Power Act gives the Secretaries of Commerce and Interior the authority to prescribe. The authority to mandate fishways has taken on great significance in licensing and relicensing proceedings because fishways can dramatically affect the capital cost and revenue potential of a project. As explained in greater detail in the Staff Report, the Commission has little recourse when it concludes that one or more mandatory conditions would render a project inconsistent with the public interest; and a clear definition would result in fewer such conflicts.

Third, I would support an amendment to the Federal Power Act (FPA) to permit the Commission to remit annual charges for other federal agency FPA Part I hydropower costs directly to the agencies, specifying that they are to be used for implementing Part I.

This would better allow federal agencies to recover their funds spent for the purpose of participating in the licensing process, and it would permit licensees to seek administrative appeal of other agency costs from the agencies themselves – and, if necessary, seek judicial review of other agencies' final determinations. The Commission should not be in a position to review the appropriateness of other agencies' expenditures. I believe the three legislative measures I have described would provide the Commission with the appropriate tools to act more expeditiously on license applications, and in some cases, could reduce the costs associated with license conditions.

I would like to comment on one final recommendation that I cannot support. The Staff Report recommends that state Clean Water Act (CWA) authority should be limited to physical and chemical water quality parameters related to the hydropower facility. Currently, a state may act under the CWA to regulate not only water quality, but water quantity and state-designated uses. I do not disagree with staff's premise that reducing the ambit of the certification to water quality itself would reduce the need for licensees to conduct studies of other matters relating to the use of project waters and thereby serve to streamline CWA certification. Nevertheless, I do not concur in staff's recommendation to limit the states' CWA authority. I believe that the determinations of state water quality agencies concerning the use of project waters reflect legitimate local concerns, and I would prefer to seek other means of working with states on CWA issues than the recommended legislation.

As a matter over which the Commission already has control, I support the continuation of the the Alternative Licensing Process (ALP), notwithstanding the fact that it involves lengthy and extensive pre-filing consultation and may not significantly reduce the overall time for obtaining a license. The most important benefit of the ALP is that it encourages parties to communicate earlier, identify issues, and discuss resolution. As a general proposition, I favor negotiated resolutions over regulatory mandates, and for this reason support the ALP. Finally, I will consider the regulatory and policy changes delineated in the Staff Report if they come before the Commission for decision.

In closing, I note that, given the events in energy markets this year, the hydroelectric program at the Federal Energy Regulatory Commission has not received as much public attention as our electric and natural gas programs. However, the energy crisis and drought conditions affecting the West have served to emphasize the importance of hydroelectric generation in the Nation's energy mix. I assure this Subcommittee that matters involving the critical issues of hydroelectric licensing, regulatory oversight, and safety have received the Commission's and staff's full attention and will continue to be a high priority for me.